***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

74-1237

To Be Argued By:
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Bernard J. Ferguson, Esq.

UNITED STATES COURT OF APPEAL
SECOND CIRCUIT

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HARLEM RIVER CONSUMERS COOPERATIVE, INC.,

Plaintiff-Appellant,

-against-

DOCKET NO.

74-1237

ASSOCIATED GROCERS OF HARLEM, INC., RETAIL, WHOLESALE & CHAIN STORE FOOD EMPLOYEES UNION, LOCAL 338, ASSOCIATED FOOD STORES, INC., FEDCO FOODS, INC., MID-EASTERN COOPERATIVES, INC., PIONEER FOOD STORES, SHOPWELL, INC., SLOAN'S SUPERMARKETS, INC., THEODORE SOLOMON, AARON KAUFMAN, and HARRY ROSENBLUM,

Defendant-Appellees.

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# JOINT BRIEF OF DEFENDANT-APPELLEES


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# JOINT BRIEF OF DEFENDANTS-APPELLEES

## Preliminary Statement

This is an appeal from an order dated February 7, 1974, and amended February 15, 1974, of the United States District Court, Southern District of New York (Lawrence W. Pierce, D.J.) which granted a motion of the Defendant-Appellees,

Retail, Wholesale & Chain Store Food Employees Union, Local 338 ("Local 338"), Associated Food Stores, Inc. ("Associated"), Fedco Foods, Inc. ("Fedco"), Mid-Eastern

Cooperatives, Inc. ("Mid-Eastern"), Pioneer Food Stores, Inc. ("Pioneer"), Shopwell, Inc. ("Shopwell"), Sloan's Supermarket, Inc. ("Sloan's"), Theodore Solomon ("Solomon"), Aaron Kaufman ("Kaufman") and Harry Rosenblum ("Rosenblum") upon the resting by Plaintiff-Appellant, Harlem River Consumer Cooperative, Inc. ("Co-op") of its case, to dismiss Plaintiff-Appellant's application for further preliminary injunctive relief.

It is an appeal from a decision of the District Court, which fit into its busy schedule 23 whole or part days of testimony, reviewed hundreds of exhibits, gave Appellant "every reasonable opportunity to support its allegations" and allowed "evidence and testimony, immaterial on the surface [to be] admitted subject to connection" (Op. 4).* and at which Appellant failed to prove any facts which would warrant the granting of a preliminary injunction.

* References to the Opinion of the District Court are in the form "Op. (page)". References to the Supplemental Opinion are in the form ("Supp. Op. (page)").

The "issues on this appeal" as posed in Plaintiff-Appellant's brief* at pages 3 to 4 are totally frivolous. Their relationship to the facts in the case and those offered at the protracted hearing below is non-existent. Indeed, some of these so-called issues are not even discussed in the brief.

Appellant's brief ignores the facts, ignores the law and ignores what occurred in the District Court. Instead, for the most part, it discusses irrelevancies and from there deteriorates into meaningless citations of general legal principles which have absolutely no relevance to the facts adduced at the protracted hearing below.

Even at this stage, Appellant poses as an issue to be determined whether there was "sufficient evidence to support a finding that directly or indirectly Defendant-Appellees are interfering with its continued access to national brand products" - yet nowhere in the brief is mentioned a single act by any Defendant-Appellee to

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* Referred to herein also as "Coop Br."

this end - and none appears in the record before this Court. Defendants-Appellees have yet to be advised as to exactly what it is any of them are claimed to have done; and this after a hearing which spanned two months, 19 witnesses and hundreds of exhibits. We take solace in the District Court's finding that whatever it is Appellant claims was done, was not done:

> "Despite the length of the hearing and the mass of evidence, plaintiff has shown neither that it has been discriminated against, nor that a group of defendants have combined to put it out of business." (Op. 4, emphasis added)

> "In other words, plaintiff has shown that the food industry in Harlem is most likely a community of many common interests and goals. But it has not introduced a scrap of evidence from which this Court could infer that one of those interests and goals is to put plaintiff out of business, or to form an oligopoly to control the Harlem market." (Op. 30, emphasis added)

It is submitted that in view of the superfluity and frivolity of issues on appeal formulated by the Appellant that this Court exercise its discretion under under 28 U.S.C. §1912 and F.R.A.P. 38 and award to

these Defendant-Appellees double costs and attorney's fees (Oscar Gruss & Son v. Lumbermen's Mutual Casualty Co., 422 F. 2d 1278, 1284 (2nd Cir. 1970)).

## The Issues Presented

The only issues on this appeal from an order denying Plaintiff's motion for a preliminary injunction are whether the District Court was clearly erroneous in its findings or abused its discretion.

The questions are:

1. Has the Plaintiff-Appellant shown that the difficulties it may have suffered in maintaining an adequate supply of national brand products were the result of prohibited conduct by those who did or could supply those products?

2. If so, did that prohibited conduct come about as a result of a conspiracy among, or wrongful acts by any of the defendants against whom this motion was brought?

## Statement of the Case

Plaintiff-Appellant, Harlem River Consumers Cooperative, Inc., is the operator of a food supermarket in the Harlem area of New York City. It has been in business since June, 1968. Its primary supplier of dry grocery products, including national brand products, since May, 1969, has been Met Food Corporation, a wholesaler. It had previously done business with another major wholesale supplier, not a defendant or party to these proceedings.

In September, 1970, plaintiff instituted this action against some 45 defendants for damages and a permanent injunction charging violations of various provisions of the Sherman Anti-Trust Act and the Clayton Act. The defendants fall into four broad categories: 1. Approximately 27 manufacturers and suppliers of food products and equipment; 2. eight competitors, operators of supermarkets in the Harlem target area, as defined by the plaintiff's complaint; 3. Local 338, a labor union, and 4. Coordinated Community Services, Inc., (CCS), a food promotion company, The

Associated Grocers of Harlem (AGH), a trade association, and a number of individuals who had an interest in those organizations. The latter two groups were described as "core" defendants.

On October 8, 1970, plaintiff moved for a preliminary injunction seeking broad relief against all defendants, except those described as defendant-competitors. Appellees Associated, Fedco, Mid-Eastern, Pioneer, Shopwell and Sloan's were not parties to that proceeding.

On or about November 12, 1970, the District Court (Mansfield, J.) granted a temporary injunction prohibiting continuation of a strike and picketing, preventing the union from interfering with plaintiff's purchasing of food and equipment or hiring of personnel, and, as regards CCS, from granting any rebates to Associated Grocers of Harlem. This Court affirmed that order. 450 F. 2d 271 (2d Cir. 1971). There has since been no claim that anyone has violated that injunction.

On October 26, 1973, Plaintiff-Appellant brought the instant motion against all defendants broadly charging that it was denied essential national brand

products at the very time that the defendant competitors were able to and did obtain such products.

Plaintiff also charged defendants with conspiring "to harass Plaintiff through discriminatory enforcement of the Police Department Rules and Regulations, and other City, State and Federal Regulatory laws and statutes..." (Expedited Notice of Motion, P.3) but appears to have abandoned this claim.

At the initial conference with the Court below, (Oct. 30), Plaintiff-Appellant dropped proceedings against all defendants, including all manufacturers and suppliers, and continued against only the ten who are the appellees in this appeal; that is, three individuals (Kaufman, Rosenblum, Solomon), Local 338, Mid-Eastern Cooperative, Inc., Associated Food Stores, Inc., Shopwell, Inc. (sued as Daitch-Shopwell, Inc.), Sloan's Supermarkets, Fedco Foods, Inc., and Pioneer Food Stores, Inc. (Order, October 31, 1973).

The asserted harm to plaintiff which the requested relief was intended to remedy was that there

had been a disruption in the supply of national brand products which plaintiff ordered from Met Food Corp., its principal supplier, leaving plaintiff without essential products which could be found on the shelves of its competitors. Met, however, is not a party in this action, was not made one in this proceeding and was not itself charged with violating the existing injunction or committing any wrong.

On October 31, 1973, Judge Pierce entered an Order directing that a hearing on Plaintiff's application commence on November 1, 1973. That Court elected to so proceed even though the only claim clearly set forth in Plaintiff's moving papers was directed against non-defendant Met. (Opinion 10, 12.) Indeed, during the oral argument conducted during the morning of October 30, 1973, Judge Pierce repeatedly pointed out to Plaintiff's attorney that its grievances appeared to be directed against non-defendants, particularly Met. (Opinion pp. 10, 12.) (Oral Argument Oct. 30, 1973 , Tr. 40, 73-4, 76-7). Plaintiff's attorney was then advised that it could make Met and any other non-

defendant manufacturer, supplier, or broker a party defendant by either amending the complaint or by serving a new complaint, and if that were done the Court would then permit the Plaintiff to seek expedited relief. (Oral Argument October 30, 1973, at Tr. 84). This was never done. Accordingly, on October 31, the District Court entered an order which directed that the "focus" of the hearing would be on whether the defendants named were responsible for a change in the status quo achieved by the preliminary injunction granted November 17, 1970, in contravention of the antitrust laws.

## FACTS

The facts pertinent to this appeal are by and large set forth in the District Court's Opinion, pp. 17-25, 30 and fns. 21-27. Appellant apparently concedes the accuracy of much of the Court's factual findings (Appellants' Brief, p. 25). We also adopt the statement of the facts and analysis contained in the brief of Local 338 at pages 17-35.

Over a period of six weeks of hearings, plaintiff was permitted to range "freely through the non-defendants' records" as well as through the records of the defendants. However, the picture developed of Met's procedures from the record made by Plaintiff is of a highly computerized system of processing orders by an operation in which the identity of the Plaintiff was

not distinguishable from that of any other customer of Met. Met employed a battery of ten order clerks (Tr. 1078, 1215, 1243-4) who randomly accepted telephone orders from its customers and fed them into a computer. The computer kept a constant inventory of Met's warehouse. As orders were fed in, the computer printed out a delivery invoice and a "scratch" list (list of items which were out of stock and therefore could not be delivered) and a list of items on ration where the order was for more than the allocated amount. (Tr. 1208-10)

Appendix I of this brief shows the "critical" products scratched from deliveries to Plaintiff and to other stores serviced by Met in the Harlem target area as well as products scratched to other Met-supplied stores but delivered to Plaintiff for two of the weeks in question.

Much of the problem appears to have been that the Plaintiff, although not computerized, placed its orders as if it were, albeit not properly programmed. For although Met, through its "Cost Plus books" (Shopwell Exh. A)(Tr. 1572-4) made available to the Plaintiff information regarding shortages of specific products, and trade

publications and other periodicals of general interest regularly contained advice of items in short supply or out of stock, plaintiff automatically ordered those items which visual examination of its shelves showed were depleted. Plaintiff made no effort to obtain different available sizes or appropriate substitutes. Plaintiff's store coordinator, responsible for the ordering of supplies, admitted receiving weekly booklets from Met Foods, its principal supplier, showing among other things, items not available, temporarily out of stock, or on limit (Shopwell Exhibit "A") but acknowledged that until the hearing in the Court below began, they had been thrown away (Tr. 1563-4), usually unexamined. It was typical that the Met "cost plus books" had for several weeks in bold faced print advised its customers that certain types and sizes of Motts Apple Sauce had been withdrawn from sale by the manufacturer, but the plaintiff's buyer could not recall having read the notices and continued to order them, complaining in this proceeding that its inability to obtain the items was the result of defendants' machinations. (See Appendix III). Even

Plaintiff's own expert witness pointed out that it was not surprising that items would be scratched from Plaintiff's order and, in fact, from the order of every other customer if they were listed in the weekly cost plus books as being "unavailable." (Tr. 805-10, 1370-2, 1569) Having been informed through its weekly cost plus books, for example, that several types of Del Monte peaches, Del Monte tomato sauce, etc., were not available, (Tr. 809-10, Appendix III) Plaintiff ordered them nevertheless and proceeded to name them among the national brand products withheld from it only by reason of the defendants' conspiracy.

The shortgages and unavailability of many of the national brand products were not simply a problem for plaintiff's supplier, but was a problem endemic throughout the wholesale supply industry in the Northeast. For example, Plaintiff developed a great deal of testimony to establish that rice was in great demand by the customers of its store but during the period of time in question was available at best in limited quantities. However, the major supplier of rice, through a witness produced on

behalf of the plaintiff testified that rice, during the late summer and early fall of 1973, was in critical or short supply and that it was frequently unable to fill the orders of any of its customers. (Tr. 2644, 2652-55) This was confirmed by an officer and a buyer for Mid-Eastern, a major wholesaler, who is one of the defendants (Tr. 319, 361) and by the officers of other stores (Tr. 364-6, Sloan's Ex. "A"). Notices sent by the supplier to its food brokers in early August gave advance notice of this shortage, as did U.S. Department of Agriculture reports for September, 1973.*

The trial judge pointed out that it was "doubtful that this court would have proceeded to the hearing which ensued" but for Plaintiff's sworn factual allegations that the co-op supplier, Met Food, was eliminating items which are major food staples in low income family diets; and that it had "gone for weeks at a time without a can of sweet potatoes, tomatoes, peaches, apple sauce, salmon, tuna fish, or rice in [Appellant's] supermarket."; and a claim, contained in an affidavit of

*Quoted in part at page 22 of Local 338's brief.

plaintiff's treasurer which described an alleged shopping trip to competing stores which were also supplied by Met, during which she purportedly purchased 49 items which the co-op was unable to get from Met Foods during that same week, (Op. 11), implying, at least, that Met had delivered those items to others but not to Appellant.

The actual testimony and evidence, however, showed quite a different picture. It showed not only that Met did not provide any of its other customers with these supplies which the plaintiff complained about, but that most other suppliers, including those of the competitor-defendants, had suffered similar shortages of these items and were unable to provide them to their customers. Finally, it was belatedly revealed that of the 49 items purchased by Plaintiff's treasurer elsewhere, 14 of the items had in fact been delivered to Plaintiff's store the week of the shopping trip (Tr. 2598-2609) (See: Appendix III), and at least five of the items of which Plaintiff complained of being scratched had not even been ordered by Plaintiff. (Tr. 2609-2615). Of the balance, items which were not delivered to Plaintiff by Met were not delivered or were in short supply for the competitors of the

Plaintiff (other stores supplied by Met). (See Appendices I and II).

The poverty of Plaintiff's allegations was more starkly demonstrated when it was shown that one of the stores in which the items were purportedly purchased had not been a customer of Met since June 20, 1973 -- four months before the shopping trip (Tr. 1303, 1305-7) and the other was well outside the competitive target area as defined by the Plaintiff. Records of deliveries to that store by Met were not produced pursuant to subpoena, for it was located outside the Harlem Target area. (See:Appendix V)* Many days of testimony could have been avoided had Plaintiff acceded to the defendants' repeated requests to identify the stores at which these items were purchased, shortly after they were placed in evidence rather than wait almost two months to disclose that its crucual claim was erroneous.

* Those records were subsequently obtained by Appellees and admitted into evidence as Local 338 Ex. PP.

Plaintiff spent little time attempting to produce more direct evidence of a conspiracy or of wrongdoing. Its suggestion that it was not permitted to obtain the benefits of advertising allowances or rebates made available to its competitors was quickly deflated by witnesses it called. Mr. Shepherd, an officer of non-defendant, General Foods Corporation, pointed out that he had analyzed Met's invoices and promotional offers to Appellant and found that it was being treated as well as, if not more favorably, than its competitors (Tr. 2265-6, 2284-5) and that Met's deals and promotions were regularly described and offered in its "cost-plus" books (Tr. 2282-4).

Appellant's efforts to show the existence of a conspiracy were also without substance, consisting largely of references to the responses of some defendants to its interrogatories and to its questions on oral depositions, much of which is not part of the record and some of which has not been filed with the Court. Indeed, most of it was irrelevant but nevertheless admitted into evidence by the District Court subject to connection (Op. 39 Fn. 28).

## ARGUMENT

### POINT I

THE COURT BELOW AFFORDED PLAINTIFF UNLIMITED OPPORTUNITY TO SUBSTANTIATE THE ALLEGATIONS UPON WHICH ITS REQUEST FOR AN INJUNCTION WAS BASED, BUT THEY PROVED TO BE FALSE AND MISLEADING. THE FINDINGS AND ORDER OF THE DISTRICT COURT SHOULD, THEREFORE, BE AFFIRMED, WITH COSTS AND ATTORNEYS' FEES

It is established law that a reversal of the findings of the District Court is proper only if they are found to be "clearly erroneous", U.S. v. Gypsum Co. 333 U.S. 364, 394-6 (1947); Fuchstadt v. U.S. 434 F. 2d, 367,369 (2nd Cir. 1970). A review of the District Court's Opinion and of the transcript of the hearing establishes beyond doubt that the court's findings were clearly correct. Indeed, if there was error below, it was in the District Court's failure to dismiss the proceeding sooner, of allowing Plaintiff's attorney to wander aimlessly through a morass of unconnected testimony and documents, and forcing Appellees to expend huge sums of money to defend against false and

baseless charges supported only by evasion and false and misleading statements.

Appellant's brief has little relevance to what happened during almost eight weeks of trial and 3,000 pages of testimony and we therefore find it necessary to review it in some detail.

A. The affidavit submitted in support of the motion for further preliminary injunctive relief

By Expedited Notice of Motion for Preliminary Injunction dated October 26, 1973, the Co-op moved for a further preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure. Essentially, as the District Court stated, (Op. 9):

> "plaintiff moved formally against all defendants for further injunctive relief, charging among other things, that the earlier injunction was being circumvented by the use of a non-defendant food wholesaler, MET Food Corp. (Met), plaintiff's major supplier of national brand dry grocery products.
>
> "The underlying grievance was that Met deliveries to the Co-op had been incomplete and, on occasion, late. As a result, plaintiff alleged, its shelves were nearly bare and its weekly gross had dropped to $35,000. At a mass meeting of defendants on October 30, 1973, plaintiff named only nine of the defendants as the conspirators with Met,

> and released the other defendants. Plaintiff later narrowed the pertinent time period to August 28, 1973, through October 24, 1973. The theory which brought the nine defendants into the picture was that certain of the previously enjoined defendants... had combined with "competitor" defendants...and that these two groups had forged non-defendant Met into a new tool to put plaintiff out of business. The means alleged was discriminatory patterns of distribution of national brand products."*

The court below was reluctant to proceed to a hearing based on an "unfocused prayer for 'further injunctive relief', and scattered invocations of a multitude of conclusory allegations sounding in antitrust" (Op. 10). However, two main allegations, contained in the sworn affidavits of two of the Co-op's officers, apparently played a vital part in the decision to order the hearing (Op. 10-11). Essentially, these were the claims that the Co-op had "gone for weeks at a time without a can of sweet potatoes, tomatoes, peaches, apple sauce, salmon, tuna fish, or rice in our supermarket". (Harris Affidavit in Support of Motion, October 24, 1973,

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*Appellant seems to now argue that it was discriminated against by some unnamed manufacturers who would not sell to it directly. This is discussed in Point II. The District Court found, however, that this claim had been abandoned (OP.38-39,fn.27).

par. 24; see also: Op. 10-11) and an affidavit from the Coop's Treasurer which described a shopping trip to competitors' stores in or surrounding the Harlem target area (which were also serviced by Met) during which she purchased 49* items which were not delivered to the Co-op by Met during the same week. (Glen Affidavit in Support of Motion, October 24, 1973, ¶¶4, 5). This provided factual support for the allegation that discrimination was occurring (Op. 11), and was crucial to appellant's claim of discrimination, for if true, it resulted in a total absence of the identified "critical" products from the Co-op's supermarket while other stores serviced by the same supplier (non-defendant Met) had an ample supply. These were the major factors in inducing the District Court to give Appellant an opportunity to develop its charges into a coherent showing of a conspiracy in restraint of trade. (Op. 11). But these sworn affidavits were false. There was not a single week when the Co-op went without sweet potatoes or without tomatoes or without peaches or without apple sauce or without salmon or without

*There were actually 50 items purchased.

tuna fish or without rice (Tr. 1343-1357, 1364-5; testimony of Venus Harris, the Co-op's store coordinator).* As to the so-called shopping trip to competitors also serviced by Met, this too turned into an almost total fabrication. The affidavit of Mrs. Glenn, plaintiff's Treasurer, (par. 4 and 5) and her testimony (Tr. 2476, 2594-2595) were to the effect that the products purchased (Plt's Ex. 1-28) were not available to the Co-op from Met that week (week of October 16th) and that none had been delivered for weeks. However, of the 50 items which Mrs. Glenn purchased on that day, October 20, 1973, the record established that:

14 were actually ordered and received by the Co-op on October 16th, the day of their last delivery (Tr. 2598-2609)

5 were never ordered by the Co-op during the week of the shopping trip - so they could not be delivered by Met (Tr. 2609-2615)

*It appears to be an instance of one who, having taken an oath before a competent officer in a case in which a law of the United States authorizes an oath to be administered, to the effect that a written declaration by him subscribed is true, wilfully and contrary to such oath subscribes material matter which he does not believe to be true (18 U.S.C. §1621).

27 were purchased by Mrs. Glenn from E & B Markets, a store which had not purchased its dry groceries from Met since June of 1973 (Tr. 2461-2466)*

As to the remaining items, a few additional observations are in order.

First, with respect to the items which Mrs. Glenn claimed to have purchased at a Met store located at 13 West 100th Street, there is absolutely no proof in the record that those items were delivered by Met to that store that week or any other week during the relevant period. Indeed, an analysis of the "scratches" on the October 16, 1973, delivery to that store (the delivery immediately preceeding Mrs. Glenn's trip) demonstrates that a majority of the items which Mrs. Glenn allegedly purchased there were not delivered by Met to that store that week or were rationed

*The E & B Store had not been a customer of Met for dry groceries since June (Tr. 1303, 1305-7; see also Affidavit of Stephen R. Bokser, sworn to November 30, 1973, part of Court's Ex. 5; and stipulation between Appellant's Counsel and the attorney for E & B Supermarkets made on the record December 13, 1973, Tr. 2449-50). Appellees submit that plaintiff or its attorney should have apprised the Court of the error in Mrs. Glenn's affidavit when Met stated on November 15 (Tr. 1303, 1305-07) that the E & B Store had not been a customer since June. Appellees did not know of the significance of the E & B Store until Mrs. Glenn finally testified on December 13th and stated that the majority of the items set forth on the schedule had been purchased at the E & B Store (Tr. 2466), because despite constant requests by defense counsel (e.g., Tr. 694-5, 712-15,1561-20),Appellant's counsel consistently refused to disclose the identity of the the two stores at which Mrs. Glenn purchased the merchandise.

by Met that week (See Local 338 Ex. PP. and Appendix V infra). It is impossible to tell whether or not the items purchased by Mrs. Glenn at that store had been delivered prior to that week at a time when they were available to everyone, and kept in inventory (Tr. 2621, Mrs. Glenn), or whether they had been purchased at a cash and carry warehouse, as Appellant itself has done on numerous occasions (Tr. 1540-4, Mrs. Harris). Furthermore, Appellant's own expert, Mr. Blythe, excluded as being "critical items"* all but three of the remaining products. Simply stated, Mrs. Glenn's testimony in no way constitutes any evidence that Met discriminated against plaintiff.

B. During the hearing, Appellant was given every opportunity to search for proof which would support any conceivable claim for relief.

The 2,800 page transcript demonstrates beyond doubt that Appellant was given every opportunity to establish

*For purposes of Mr. Blythe's testimony, the word "critical" was defined to mean "critical and necessary to supermarket operation in this Harlem target area." (Tr. 720-1)

any facts which put together in any fashion might in some way afford relief under any legal theory. The court was reluctant to limit proof or even to require Appellant to specify any particular legal or factual claim (see for example Tr. 579-80). It was November 21, 1973, before Appellant furnished the Court with a list of "critical items" and a list of the alleged offending parties so that the Court and the defendants could discern the contours of its claim for relief (the "Thanksgiving Submission", Tr. 1319). But Appellant did not feel bound by its own submission and was permitted to wander to additional items and persons (see for example Tr. 2246-48).

Nor was Appellant limited in its opportunities to obtain proof from the defendants. They produced officers and voluminous amounts of records on request and many hours were spent reviewing them. The non-defendant, Met Foods Corp., was subpoenaed and Appellant permitted to range freely through its records. Evidence and testimony, immaterial on the surface, was admitted subject to connection. Hearsay was admitted in an effort by the Court to allow

Appellant the greatest liberality of proof. Indeed, the District Court recognized the unusual liberality of evidentiary rules (Op. 4) and specifically held that no Appellee would be bound by rulings made at the hearing (Op. 39, Fn. 20).

To move things along, again to give Appellant every fair chance of supporting its charges, at the Court's urging, Appellees agreed to limit and defer full cross-examination of Appellant's witnesses to expedite the presentation of the Co-op's direct case. Indeed, on one occasion, the trial continued until midnight to enable one of the Appellants' experts to return to California early the next morning.

Despite all of this, Appellant dares to pose the unanswered question in its suggested "issues on this appeal":

> "7. Did the Court below allow the Defendants-Appellees to interject extraneous issues, that disrupted Plaintiff's presentation of its evidence, which obstructed and impeded the administration of justice in this action, particularly in view of the public interest in its outcome." (Brief of Plaintiff-Appellant, p. 4)

This is a travesty, but is indicative of what Appellees were forced to endure. The facts are clear -- Appellant had every opportunity to prove anything it could -- and it proved nothing.

C. The record is totally barren of any evidence to support Appellant's allegations that it was in any way discriminated against by Met. The evidence shows that Appellant was a number in a computerized distribution system which did not exercise either favoritism or discrimination.

The record establishes beyond doubt a total absence of discrimination against Appellant by Met. Indeed, Met was shown to be a highly computerized food wholesaler where customer orders were put together, not by a human who could perhaps exercise human prejudice, but by a machine programmed to treat everyone on a first come - first serve basis without distinction (Tr. 1207 - 1211). As the District Court found:

> "The procedure by which plaintiff placed its orders with Met Food was not disputed and is a common one in the industry. Plaintiff's Store Coordinator telephoned the weekly order to a Met Food order clerk approximately five days prior to expected delivery. That clerk keypunched a tape which was fed into Met's computers. These computers are programmed to print-out an invoice of items to be delivered and a separate list of items ordered which are

> purportedly out of stock or which the wholesaler is rationing among customers becuase of short supply. It is not contested that the total of these two lists, the delivery invoice and the "scratch list" (in the parlance of the trade) represents the order called in by the customer. Sets of these documents are the most reliable evidence of Met's dealings with plaintiff." (Op. 17-18).

It was established, and Respondents concede, that the Co-op was "scratched" (i.e. not delivered) various items, including national brand products. As the District Court found,Appellant's "orders were not filled completely, and that national brand products were prominent among the items 'scratched'." (Op. 18) It was further found that the "scratch" percentage ranged from 10% (August 28, 1973) to 17% (September 10, 1973) to 11% (September 24, 1973) to a high of 19% scratched on October 16, 1973 and back down to 13% on October 23, 1973, the end of the relevant period. (Op. 19, 21)

That is all that was shown. Undeniably harmful to the Coop and to every other grocery store in the industry, but harm alone does not demonstrate a violation

of the antitrust laws, Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F. 2d 283, 287 (6th Cir.), cert. den. 375 U.S. 922 (1963) or of any other law, 25 C.J.S. (Damages §5) at 634.

It was thus incumbent upon Appellant to establish, as a threshhold question, that it was discriminated against in some way by Met. But,

> "Plaintiff's proof virtually ignored these fundamental elements of "discrimination ." Instead, it concentrated on the unilateral treatment it had received from Met food, and upon the damage such treatment had inflicted upon plaintiff." (Op. 16)

Suffice it to say that not even in this Court does Appellant point to a single element of discrimination against it by Met and, in fact, no such discrimination ever occurred.

Although the burden is upon Appellant to establish discrimination, the evidence established beyond doubt the contrary. Mr. Ricci, an officer of Met foods,

comparing Appellant's scratch lists with those of the other customers for the weeks of September 17 to 21 and September 24 to 28, testified that where Appellant was scratched on an item, other stores were also scratched (Tr. p. 1255-1287). He further testified that a review of all such records, showed that Met treated Appellant the same way it treated everyone else in Harlem (Tr. 1287), that to his knowledge, Met treated Appellant the same way as it treated its other customers during the entire relevant period (tr. 1288), and that the Met computer had not been programmed to discriminate against plaintiff by scratching items ordered by plaintiff if the items were available. (Tr. 1207-11, 1244-6, 1287-8).

The Court below made its own analysis of the evidence, comparing deliveries by Met to various stores during the weeks of August 27 and October 15, 1973 (Op. 22-23), and concluded:

> "Those charts reflect two facts which may be fairly interred from the whole of Met Food's records. First, there is no apparent pattern of discrimination against any particular customer. Throughout the period in question, the Co-op and its competitors have each sometimes suffered large percentage scratches, and

and at other times, lesser percentage scratches. Thus, the fact that the Co-op's order of Aug. 28, 1973 was "scratched" 10% while Teitler's order of Aug. 29, 1973 was "scratched" 14% does not indicate that Teitler was in disfavor. Nor does the 19% "scratch" factor in the Co-op's Oct. 16, 1973 delivery as against Teitler's 9% and 11% for each of its orders of that week, show that Teitler was being favored. The shifting positions of the various competitors is more likely attributable to such variables as Met's constantly revolving inventory, and the fact that supermarkets do not carry precisely the same items each week, and do not necessarily require the same quantities of the same items on the same schedule. Further, they do not order with the same frequency, or on the same day. Therefore, the second fact which can be inferred from these figures is that during the relevant period all of Met's customers could expect their orders to be scratched, regardless of the variables, at a minimum of around 10%; and that the risk, depending upon the variables, ran upwards to 20% and higher. The underlying documents also indicate that each store could expect and did receive an incidence of "scratched" "critical" products comparable to plaintiff's."

"Other evidence elicited from plaintiff's witnesses strengthens this Court's conclusion that Met Food has not been systematically discriminating against plaintiff or any other customer discussed at this hearing. In fact, it would appear from the evidence adduced thusfar that Met Food is systematically attempting to make the best of a bad situation which is not of its own doing."

Thus, Appellants claim of discriminatory treatment by its supplier was totally fictitious. Indeed, although Appellees repeatedly requested Appellant to provide instances where the Co-op was scratched on an item and other Met customers received the item (see for example colloquy at Tr. 1294), Appellant could not do so for the simple reason that the claimed discrimination never occurred.*

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* The record, however, is replete with testimony of industry wide shortages resulting in problems being experienced by everyone (see for example: Tr. 93-94, 128-130 , 150, 168-169 (Newmark); Tr. 283-285, 289-290,301, 304-305, 484 493, (Rose); Tr. 318-319 (Anastasio); Tr. 357-363, 367, 373, 382, 385-387, 402-405 (Grimson); Tr. 364 (Kaufman); Tr.788-791, 820-821, 834-835, (Blythe); 1565-1571, Harris (referring to Shopwell Ex.A); Tr. 1877-1878, (Higgins); Tr. 2010, 2034 (Bromberg); Tr.2644, 2652-5 (Collins) The exhibits introduced into evidence or stipulated to be accurate contained similar facts (Sloan's Ex. A,B,C,D. E.F; Shopwell Ex. A,B,(for id.) C (for id.) E (for id.) Local 338 Ex. A-1, B-1, C, D, E, 00).

It should be noted also that Met was the only dry grocery supplier with whom Appellant dealt during the relevant period. More importantly, Appellant did not deal and did not attempt to transact any business with any of the Appellees during the relevant period. As to Shopwell, Sloans, Fedco and Kaufman, the evidence failed to establish anything other than they were retailers who did not purchase dry groceries from Met. As to Pioneer, Mideastern and Associated, wholesalers who are Met's competitors, the evidence showed that plaintiff never even attempted to buy anything from any of them.

Appellant did show that it was in distress as a result of the non-delivery or short delivery of merchandise it had ordered, of cash flow problems, bounced checks, a threat by the Internal Revenue Service to seize its assets. (It was not alone. Two defendants; Colonial Supermarkets and Food Family, have filed bankruptcy petitions since this case began.) The cause of these problems cannot be laid at Appellee's doors, for there is evidence to show that they can be attributed, if not entirely, at least in part by Appellant's mismanagement and extraordinary legal expenditures as well as by shortages.

Indeed, the evidence established beyond doubt that Appellant's own practices increased the size of its scratch lists and the amount of items scratched. Its own ordering policies exacerbated the effect of industry wide shortages upon its operations. (see Op. of the District Court, fn. 21).

Testimony of plaintiff's own witnesses showed that there were extraordinary industry wide shortages of food products during the period in question. It was essential for everyone in the chain of distribution, from manufacturer

to retailer, to keep informed of what products were available. Manufacturers sent bulletins to their customers, such as Met. Met, in turn, published this information in its Cost-Plus Books (Shopwell Ex. A)* to keep its customers (such as Appellant)

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* The facts surrounding the delivery of these Cost-Plus Books to court and their introduction into evidence as Shopwell Ex. A are indicative of the deceit practiced by plaintiff and its counsel during the hearing below. The books were first produced pursuant to a subpoena served on Met on November 7, 1973, in court. Counsel refused to accept them, claiming they were not what was requested, "These are the cost-plus books that we never got" (Tr. 603, Colloquy). After a short recess, Plaintiff's counsel stated:

> "I showed him (Met's attorney), your Honor, the books that he brought are the cost-plus books referred to in Plaintiff's Exhibit 60 for identification. That is not what we are seeking." (Tr. 604)

The matter surfaced again at a hearing before Magistrate Schreiber on November 8 (See Hearing before Magistrate Sol Schreiber, November 8, 1973, especially pp. 9 and 22-3).

Following the Magistrate's hearing, counsel returned to the trial court, where plaintiff's counsel, speaking of the cost-plus books stated:

> "May I say first we didn't get a copy. We never got a copy. The first time we saw them was yesterday...". (Tr. 685)

The cost-plus books were then delivered to Mr. Weinreich,

aware of what was occurring (Tr. 679-685 Colloquy; Tr. 803-810 ; hearing before Magistrate Sol Schreiber, November 8, 1973, pp. 11-19)

These Cost-Plus books were therefore fairly important, a factor which plaintiff certainly knew considering it had "begged" Met to receive them

---

identified as Shopwell Ex A (Tr. 702), and admitted into evidence (Tr. 703-706).

Later that evening, Mr. Blythe, one of plaintiff's expert witnesses, was being examined with respect to the cost-plus books and plaintiff's counsel noted:

> "the witness is being questioned with respect to a Met book other than the one that was delivered to the plaintiff..." (Tr. 810)

and later

> "No. Here there has been no one in this Court that says that that book was ever delivered to plaintiff" (Tr. 812).

However, it later developed that these Cost-plus books had been sent to plaintiff every week for over a year, according to the testimony of Mrs. Venus Harris, the Co-op's store coordinator (Tr. 1060-1, 1366; See also Tr. 2424-25 (Maidenbaum); Bennet aff. sworn to December 20, 1973; Tr. 804 (Blythe). Indeed, Plaintiff had 'begged" Met to send it these books (Tr. 2164, Mr. Dolly). Yet Appellant's counsel attempted to have the books taken back before Appellee's counsel had an opportunity to review them and ascertain what they were.

(Tr. 2164, Mr. Dolly). Yet plaintiff ignored the Cost-Plus books which listed (1) items which Met did not have in stock, (2) items which Met was rationing (i.e., a specified limit per customer) and (3) items that were unavailable in the marketplace. In ordering merchandise, plaintiff's employees made no allowance for items listed as out of stock or unavailable (Tr. 787-788, 1565-1569). Indeed,plaintiff's buyer, Mrs. Harris,testified that she only read the Cost-Plus books on occasion (Tr. 1366, 1565, 1567), even though she was well aware that they contained lists of products that were rationed, discontinued or not available (Tr. 1565-1568).

Mr. Blythe, who had trained plaintiff's employees, conceded that when one orders items listed as unavailable, it is expected that the items would be scratched (Tr. 858). Thus, when a retailer orders items on "out of stock" and "unavailable" lists, it will increase the number of items scratched. Similarly, if five cases are ordered of an item where the supplier is rationing its customers to one case, four cases will be scratched.

Mrs. Harris agreed with this analysis (Tr. 1369, 1372, 1565, 1569). As she put it, you ordered and "sometimes you are lucky and you get a case" (Tr. 1565). Yet, despite all of this, Appellant claimed that large scratch lists was evidence of something sinister. In fact, it is evidence only that the Co-op ordered unavailable items hoping that the product might actually be available from Met when the order was placed. Leaving aside whether this is proper business practice, it had a natural effect of increasing the size of the Co-op's scratch list. (Tr. 858).

Furthermore, Appellant failed to take measures customary to the trade to alleviate its shortages. It was established that if a customer cannot find the size of a product he wants, he will purchase a different size which is available (Tr. 282, 829-830). Many customers would accept a different brand of the same product (Tr. 1988-1990, 2002-2004). But Mrs. Harris testified that she would not refer to the Cost-Plus books in order to see what was unavailable and order as substitutes different sizes or different

products which were available at the time (Tr. 1569-1571, 1574-1575). Thus, in a hypothetical situation, assume Appellant ordered five cases of 2 pound bags of Carolina Rice, and no cases of the 1 pound bags of Carolina Rice; if Met was out of the 2 pound size but was overstocked with the 1 pound size, Appellant would get nothing, for the Met computer was not programmed to substitute sizes (Tr. 1250-1251). Although an examination of the out of stock lists in the Met Cost-Plus books, or even asking Met what was out of stock, could have enabled substitution of brand or size, Appellant did neither. (Tr. 1563-1565, 1569-1571).

Mr. Blythe also testified that if he knew a product would be in short supply, he would order a three week supply (Tr. 787-788) and conceded that other buyers might stock up in such a case (Tr. 847). Mrs. Harris, while conceding that the Cost-Plus books (Shopwell Ex. A) were replete with information of shortages (Tr. 1572-1574), would never use them for purposes of ordering even the three week supply recommended by Mr. Blythe in these circumstances (Tr. 1576-1579).

D. Even if appellant had proven discrimination, that would have been insufficient to justify any preliminary relief unless there was some proof that appellees were in some way responsible for that discrimination.

As the District Court correctly found, it was not enough for plaintiff to establish discrimination against it by Met - a company which plaintiff refused to make a party defendant (Op. 12, 35 footnote 14). Plaintiff would still be required to prove (1) that the discrimination by Met was wrongful as to plaintiff and (2) that it was done

> "with the knowledge of and the encouragement of the defendants." (Op. 12)

i.e., some "conspiratorial relationship" between Met and the defendants (Op. 12) was an essential element of appellant's case. However, plaintiff's proof touched on neither element.

The Court below correctly noted that simple discrimination is not necessarily unlawful.

> "As a general proposition, the antitrust laws exist 'to protect competition, not competitors." Checker Motor Corp. v. Chrysler Corp. 283 F. Supp. 876, 885 (S.D.N.Y. 1968), aff'd, 405 F. 2d 319 (2d Cir.), cert. denied, 394 U.S. 999 (1969). See e.g., United States v. Socony-

> Vacuum Oil Co., 310 U.S. 150, 220-21 (1940). This means that a company is entitled to sell or not to sell to any customer, or to sell as much as it sees fit, unless such actions are accompanied by unlawful discrimination within the meaning of Section 2 of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act, 15 U.S.C. §13; or accompanied by an unlawful agreement within the meaning of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1; or conceived in monopolistic purpose or for market control within the meaning of Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2. (citations omitted) Thus, it is not necessarily a violation of the antitrust laws when a supplier allocates, or in any other way attempts to exercise control over which of its customers will receive how much of its products. Banana Distributors, Inc. v. United Fruit Co., 162 F. Supp. 32 (S.D.N.Y. 1958) rev'd on other grounds 269 F. 2d 790 (2d Cir. 1959) Independent Iron Works, Inc. v. United States Steel Corp., 177 F. Supp. 743 (N.D. Calif. 1959); aff'd 322 F. 2d 656 (9th Cir.), cert. denied, 375 U.S. 922 (1963)." (Op. 14-15).

Independent Iron Works, cited by the District Court, is directly on point. There, plaintiff introduced evidence that defendants failed to fill all of plaintiff's orders. There, as here, the evidence showed that there was a general shortage of products, that suppliers rationed some items and failed to deliver others, and that

plaintiff's suppliers favored certain other customers. (In contrast, however, here the evidence demonstrates that Met has not discriminated against plaintiff or against anyone else and no discrimination by anyone else against appellant was established).

The District Court, in dismissing at the end of plaintiff's case, wrote (177 F. Supp. at pp. 747-8):

> "It is settled law, hoever, that each defendant, acting individually, was legally entitled to sell or not to sell to any customer or to sell him as much as he saw fit. Times-Picayune Pub. Co. v. United States, 1953, 345 U.S. 594, 625, 73 S. Cut 872, 97 L. Ed. 1277.
>
> "If a manufacturer may sell to whom he pleases it is entirely logical that he may restrict his sales as to quantity, and sell to his customers such quantities as he may see fit." Foshburgh v. California & Hawaiian Sugar Refining Co., 9 Cir. 1923, 291 F. 29, at pages 36-37.
>
> "And an allocation system alone, without further factors, is not inherently illegal as a method of distribution in times of scarce supply. Banana Distributors v. United Fruit Company, D.C.S.D.N.Y. 1958, 162 F. Supp. 32, 42.
>
> "The Banana case recognizes that logic and good business sense of some method

> of rationing in a shortage period. Any other approach, as the testimony here shows, would leave many customers with no steel at all.
>
> ***
>
> "Plaintiff further argues, however, that each defendant supplies proportionately larger quantities of steel to its own fabricating shops. Even if true, this alleged favoritism of defendants own fabricating shops would suggest normal, rather than conspiratorial conduct. In Dipson Theatres v. Buffalo Theatres, 2 Cir. 1951 190 F. 2d 951, 960, 961 certiorari denied 1952, 324 U.S. 962, 72 S. Ct. 363, 96 L. Ed 691, the court in commenting on the evidence that 'it was the policy of each [defendant] to favor theatres in which they had an interest,' said, 'This was to be expected, and the fact that they did so is no evidence that they conspired to do so jointly rather than doing so individually'; they 'could legally favor their own theatres' (emphasis added)."

In affirming that dismissal, the Ninth Circuit stated:

> "The mere fact that two or more of the defendants dealt with plaintiff in a substantially similar manner does not support an inference of a conspiracy, even though each knew that the business behavior of another or the others was similar to its own..." (322 F. 2d at 661)

The Ninth Circuit thus held that the existence of a structural steel shortage at the time fully explained

the similar conduct and negated any inference of conspiracy, stating:

> "...here it appears beyond question that outside factors dictated the change. In early 1955 the market for structural steel construction was such that the defendants were well able to supply, and they did supply in full, the needs of all their customers, including the plaintiff, but in mid-year an unexpected building boom suddenly occurred causing a radical shift in the demand for structural steel. Almost overnight the defendants were deluged with unsolicited orders for steel far in excess of their production capacity; and the demands upon them continued to mount in the weeks that followed. To make matters more difficult the defendants had no way of determining how long the usual demand would continue or where it would eventually level off... In this milieu we see no justification for an inference of any Sherman Act violation from the fact that all the defendants changed their mode of distribution at about the same time." (id. at 661-662)

Similarly, in the case at bar, food shortages during the relevant periods were attested to by plaintiff's own expert witnesses (supra pp.13,14,33) as well as the defendants' officers and employees who were called by plaintiff (supra pp.4,32- 3 ). Numerous newspaper articles dealing with serious food shortages were also

introduced (Local 338 Ex. F). In addition, this Court may take judicial notice of official United States Department of Agriculture Reports which discuss, inter alia, the low supply of rice in August, the three to four week delay in harvesting the long-grain rice crop in September due to a hurricane, the short supply of canned peaches, apple products, tomato products, etc.*

However, Plaintiff did not even surmount the first hurdle enunciated by the Court in Independent Iron Works since there was no showing that any of Plaintiff's suppliers discriminated against it. Furthermore, Plaintiff never purchased anything from any of the Appellees during the period.

Since discrimination by a supplier was a threshhold issue, we fail to understand why Met and the manufacturers of national brand products were expressly and intentionally excluded as parties to this proceeding. Disregarding this, however, it was nevertheless incumbent upon Appellant to establish some conspiratorial relationship between these defendant-appellees and a supplier.

*Quoted in part at p. 22 of Local 338's brief.

Instead of evidence of the existence of an illegal conspiracy, Plaintiff offered only conjecture.

As the District Court held:

> "It is elementary that to prove a conspiracy the plaintiff must show, first, that there was an agreement between at least one of the named defendants and Met Food, with an unlawful purpose to restrain trade; and, second, with respect to each defendant named, that such defendant knowlingly participated in the agreement." (Op. 27).

See also: United States v. Falcone, 311 U.S. 205, 210-11 (1940); United States v. Cianchetti, 315 F. 2d 584, 588 (2d Cir. 1963); Stanley v. United States, 245 F. 2d 427, 430 (6th Cir. 1957); United States v. Wall Baking Co., 224 F. Supp. 66, 69 (E.D. Pa. 1963); TIMBERLAKE FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS, p. 207 (1965 ed.) Klein v. American Luggage Works, Inc. 323 F. 2d 787, 791 (3d Cir. 1963); Johnson v. J.H. Yost Lumber Co., 117 F. 2d 53, 62 (8th Cir. 1941).

Absolutely no evidence was elicited to show or even to suggest that Met is or was conspiring with any of the appellees herein. Indeed, the evidence is

totally to the contrary. Thus, for example, in the hearing before Magistrate Jacobs on December 13th, Mr. Maidenbaum denied under oath that he had any communications with Shopwell, Associated, Pioneer, Mid-Eastern, Local 338 or Federation of Cooperatives, Inc., between November 25, 1970, up to the present time. (Tr. 32-33) His only communication with Sloans involved the fact that Met had lost them as a customer and once sought to try to do business with them again. Met's communications with Fedco (none of which were with Mr. Maidenbaum) merely arose because Fedco buys some dairy products from Met (Tr. 33).

The only testimony respecting any dealing between any defendant and Met is that defendant Rosenblum's store entered into a standard customer security agreement with Met to secure the extension of credit (Tr. 529); that Rosenblum owed Met between $40,000 and $50,000 as of May 2, 1973 (Tr. 534); that Rosenblum filed a Chapter XI petition in February, 1973 (Tr. 517, 522); that Met's attorneys were involved in the bankruptcy (Tr. 522); and that Met and/or the federal government, pursuant to a Court order dated August 24,

1973, caused to be sold the assets of Rosenblum's stores (Tr. 518-21, 532). That testimony would certainly appear to refute any claim that Rosenblum and Met were secret conspirators.

Likewise, there is absolutely no evidence to suggest that any of the defendants have conspired with each other. Sloans, Shopwell, Mid-Eastern, Pioneer, Fedco and Associated do not buy or sell to each other. All of them, as well as defendant Kaufman, suffered from the general food shortages during the summer and fall of 1973. (See supra pp. 14,32 ).

Appellant was unable to introduce any evidence of conspiratorial conduct because there was none. Instead, it introduced evidence calculated to show that some of the defendants knew each other, were related to each other or belonged to the same trade associations. But none of this is sufficient to infer that any of the parties in any way conspired with each other to harm Appellant in any way. Phelps Dodge Refining Corp. v. F.T.C., 139 F. 2d 393, 396 (2d Cir. 1943); Vanderveld v. Put and Call Brokers and Dealers Association, Incorporated,

344 F. Supp. 118, 155 (S.D.N.Y. 1972).

Judge Pierce's pointed characterization of the case made by Appellant leaves little room for comment:

> "All the Plaintiff has shown, in rather broad strokes, is that people involved in the food industry in Harlem tend to know each other; that they tend to belong to the same trade associations; and attend the same trade conferences; and that their clerks are represented by the same union; and that the retailers who, like plaintiff, must depend upon wholesalers for their dry grocery supplies, tend to change from supplier to supplier as often as plaintiff does, for the same profit-oriented reasons.
>
> "In other words, plaintiff has shown that the food industry in Harlem is most likely a community of many common interests and goals. But it has not introduced a scrap of evidence from which this Court could infer that one of those interests and goals is to put plaintiff out of business, or to form an oligopoly to control the Harlem market." (Op. 30)

## POINT II

## THE DENIAL OF THE APPLICATION FOR A PRELIMINARY INJUNCTION SHOULD BE AFFIRMED WITH COSTS.

We have earlier recited the criterion for an appellate court's reversal of a trial court's denial of a

preliminary injunction: that the findings of fact were clearly erroneous and that the denial of the injunction was an abuse of discretion, U.S. v. Gypsum Co., supra, Fuchstadt v. U.S., supra, Checker Motors Corp. v. Chrysler Corp., 405 F. 2d 319 (2d Cir.), cert. den'd, 394 U.S. 999 (1969). Appellant's excruciating efforts to support reversal bring forth a discussion of the effect or lack of effect of the weather upon the 1973 rice crop (Coop Br. 27); an obtruse allusion (without reference to the record) to a witness' testimony "as to wholesale industry practice of favoring customers, if it so desired" (Coop. Br. 27); protestation that Met Food cooperative member stores are not its competitors (Coop Br. 22), and that manufacturers may grant purchasers advertising allowances and rebates. (Coop Br. 30). None of this is relevant.

Having released the national brand manufacturers and suppliers from this hearing before it began, refusing, though invited by the Court to do so, to make Met Food, its primary supplier, a party to this proceeding, Appellant proceeds against parties whose only business is selling food at retail, a wholesaler with whom it has not done nor sought to do business since 1969, and

a labor union.

Thus, never having afforded to the court jurisdiction over the manufacturers of critical national brand products who had or might have had any relationship with the Appellant, Appellant now insists that its "entire application was addressed to this discriminatory marketing distribution of the critical supermarket National Brand products." (Coop Br. 31) Yet the record is slient on this issue.

The trial court did not lose sight of "the fact that it is the refusal to deal with Appellant". (Coop Br. 32). That claim was never brought within its view. Those with whom Appellant tried to deal were not parties and those who were parties had no occasion to deal or refuse to deal with Appellant.*

*To the extent that Appellant belatedly argues that some unamed, unknown manufacturers refused to deal with it, the testimony failed to establish that Appellant even attempted to deal with any manufacturer except General Foods (Tr. 1358-6). Furthermore, Mr. Neumark, Appellant's expert, testified that it would "just be prohibitive in cost" for most manufacturers to ship direct to a single store (Tr. 161-5). In addition, Mrs. Harris, the Co-op's store coordinator, testified that the Co-op could not handle the deliveries if each manufacturer were to make its own delivery (Tr. 1086-8). The District Court found that this theory had been abandoned (Op. 38, fn. 27) and no other conclusion is possible.

Unable to do anything about the weather, Appellant discusses in its brief the Court's findings with respect to the testimony of Robert J. Collins, its own witness, who stated that the hostile forces of nature were largely responsible for Plaintiff's lack of the product of Carolina Rice in the summer and fall of 1973. Appellant seems to imply that there was documentary evidence which conflicted with his testimony, but the nature of that conflicting evidence is undisclosed. The only document introduced into evidence which had eminated from the manufacturer of Carolina Rice was Local 338's Exhibit 00 which in August, 1973, described the rice situation as follows:

> "1. The 73 Rice Crop Year found supplies of Rough Rice dwindled to the lowest level recorded in over 25 years.
>
> 2. During this '73 crop year, demands for Rice domestically (U.S.A.) reached all times highs. Export demands also reached an all time high due to World Crop failures that sent sales to record levels.
>
> 3. The pressure on this Country to supply Rice to the underdeveloped countries has completely depleted this Country's inventory of Rough Rice."

There was no conflicting evidence. Thus, the District Court discussed the evidence concerning the rice supply and pointed out:

> "Thus plaintiff's own experts testified that food shortages had been forecast for 1973 since begining of the year, and that the food manufacturers

reacted to price controls by withdrawing products from the market, and the effects of both were felt across the nation in the late summer and early fall of 1973." (Op. 23)

"Of some interest is a recent report citing these same ecomonic and meteorological occurrences during 1973 for the current rising price of rice. See, N.Y. Times, Feb. 4, 1973, #1 at 25 column 1." (op. 38 fn. 26)

Defendant competitors and wholesalers alike experienced the same shortages as the plaintiff with respect to rice. Indeed, one witness, Richard Grimson, Mid-Eastern's buyer, testified that it had been withdrawn from the market in the middle of August. (Op. 24) There was more than ample support for the Court's findings in this regard.

As a second instance of a claimed erroneous finding by the Court below, Appellant refers to the question of whether Met Food member stores are plaintiff's competitors. Appellant, in what appears to be a reversal of its position in the trial court, vehemently denies that they are competitors (Appellant's Br. 28). In the court below its counsel stated, seeking to obtain disclosure from non-defendant Met:

"Your Honor, I was asking, I have said it again and again, what I need, and I stated for the record, there are competitors that are serviced by Met. I am concerned with the question of whether these items

were in fact based on their record available to all competitors during same identical time that they had notified us they were out of stock.

The Court: That would seem to be the crux of the matter." (Tr. 691)

Similarly, Appellant's store coordinator testified that "any store in Harlem is a direct competitor". (Tr. 1568) and "I would say that everybody in the business is a competitor" (Tr. 15-56). (See also: Tr. 1435, 1481, 1585-7). But it is really irrelevant whether these stores are the Coop's competitors or not, for the issue which was tried was whether Met discriminated against Appellant as compared to its other customers, and the record fails to demonstrate any such discrimination.

Rather than repeat the points raised by Appellee Local 338 in its separate brief in this court, these Appellees adopt the arguments contained in Local 338's brief (pp. 35-44).

The evidence upon which the trial court denied the application for a preliminary injunction permitted no other result. Rather than clear error, its decision reflected almost infinite patience with and solicitude for the Plaintiff's position. Nevertheless, the District Court could not find within the confines of permissible discretion a basis for granting an injunction. This finding was clearly correct and should not be disturbed.

## CONCLUSION

The order appealed from should be affirmed, with costs and counsel fees.

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## Appendix I.

### Comparison of Critical Products Scratched to Plaintiff and Other Stores In Harlem Serviced By Met

A. Week of August 28, 1973

| Critical Products Scratched To Plaintiff (Ex. 62C) | Scratches of Same Products To Others (338 Ex. QQ) |
|---|---|
| Del Monte Sl. Y.C. Peaches 8.75 oz. | Teitler, Food City, Sureway Cherrie |
| Del Monte Hvs. Y.C. Peaches 16 oz. | Teitler, Food City, Food Pageant |
| Del Monte Sl. Y.C. Peaches 16 oz. | Teitler, Sureway, Cherrie |
| Del Monte Sl. Elberta Peaches 16 oz. | Food City |
| Del Monte Sl. Elberta Peaches 8.75 oz. | Food City |
| Del Monte Tomato Sauce 15 oz. | Teitler, Food City |
| Hellman's Old Homestead | Teitler, Cherrie, Food City |
| Hellman's French Dressing | Teitler, Cherrie, Food City |
| Libby's Vienna Sausage 9 oz. | Food Pageant, Sureway, 170 Lenox Corp. |
| Libby's Corned Beef 7 oz. | Teitler, Sureway, Cherrie, 170 Lenox Corp., Food City |
| Corned Beef Hash (Libby's) | Cherrie, Food City |
| Libby's Potted Meat lg. | 170 Lenox Corp. |
| Libby's Potted Meat small | 170 Lenox Corp. |
| Sloppy Joe | 170 Lenox Corp. |
| Motts Apple Juice 46 oz. | Food Pageant |
| Motts Applesauce 25 oz. | Teitler, Food City, Sureway, Cherrie |
| Icy Point Salmon | Sureway (Icy Point Salmon and Alaska Salmon Cherrie (Icy Point Alaska Salmo |

| Critical Products Scratched To Plaintiff (Ex. 62C) | Scratches of Same Products To Others |
|---|---|
| White Rose Sweet Potatoes 16 oz. | Teitler, Food Pageant, Food City |
| Kelly W. Potatoes 16 oz. | Teitler, Food City |
| Kelly Sl. Potatoes 16 oz. | Teitler, Food City |
| White Rose Sweet Potatoes 8.5 oz. | Teitler |
| White Rose Sweet Potatoes 17 oz. | Food Pageant |

## A.-1 Deliveries and Scratches of Carolina Rice During Week of August 28, 1973

1. Plaintiff received 2 cases of the one pound size and was scratched in the 2 lb. (4 cases), 3 lb. (4 cases), 5 lb. (3 cases) and 10 lb. (2 cases) sizes.

2. Teitler received no Carolina Rice that week. It was scratched in the 10 lb. (15 cases), 3 lb. (5 cases) and 1 lb. (1 case) sizes.

3. Food City received one case of the one pound size. It was scratched in the 10 lb. (2 cases), 3 lb. (3 cases) and 2 lb. (2 cases) sizes.

4. Food Pageant received no Carolina Rice.

5. Cherrie received no Carolina Rice. It was scratched in the 10 lb. (2 cases), 3 lb. (2 cases), 2 lb. (2 cases) and 1 lb. (2 cases) sizes.

6. 170 Lenox Corp. received no Carolina Rice. It was scratched in the 5 lb. (1 case), 3 lb. (2 cases), 2 lb. (2 cases) and 1 lb. (2 cases) sizes.

7. Sureway was scratched in the 3 lb. (4 cases), and 2 lb. (3 cases) size. While the delivery invoice lists one case each of the 1, 2 and 3 lb. sizes, a red ink line crosses those items out.

## A-2. Some of the Items Which Were Scratched to the Other Stores, Which Do Not Appear on Plaintiff's Scratch List Ex. 62C.

Admittedly, schedule A hereto of this Appendix does not list every item which appears on plaintiff's scratch list or the scratch lists for the other stores. This is primarily due to the fact that the instant hearing did not concern every item, but rather certain allegedly critical items. Moreover, all stores do not carry an identical list of food items and obviously everyone doesn't order every item every week.

Consequently, set forth below are just a few of the critical items which do not appear on plaintiff's scratch lists but which were scratched to some of the other stores.

1. Teitler:
   - (a) Red Pack Italian Style Tomatoes 28 oz.
   - (b) Libby Peaches (2 types)
   - (c) White Rose Peaches (3 types)
   - (d) Gil Netter Salmon (2 types)
   - (e) Bumble Bee Blue-back Salmon 7 oz.
   - (f) Tuxedo Salmon
   - (g) Kelly Sweet Potatoes 8 oz.
   - (h) W.R. Tiny White Potatoes 8 oz.
   - (i) Kelly W. Potatoes 8 oz.

2 Food Pageant:
   - (a) White Rose Peaches (5 types)
   - (b) Jack Rabbit Cow Peas 1 lb.
   - (c) Bumble Bee Red Alaska Salmon (2 sizes)
   - (d) Bumble Bee Pink Salmon (2 sizes)
   - (e) Tuxedo Salmon

Appendix I.

3. Food City:

(a) White Rose Peaches 29 oz.

(b) Motts Apple Juice

(c) S.& W. Elberta Peaches 8.75 oz.

Appendix I.

B. Week of August 31 - September 7, 1973

| Scratches to Plaintiff, Ex. 63C on Sept. 6 | Scratches of Same Products to Others |
|---|---|
| Del Monte Sl. Y.C. Peaches 8.75 oz. | Teitler, Sureway, 3149 Food Corp., 170 Lenox Corp. |
| D.M. Sl. Y.C. Peaches 29 oz. | Teitler, Sureway |
| D.M. Hvs. Y.C. Peaches 29 oz. | 170 Lenox Corp. |
| D.M. Hvs. El. Peaches 29 oz. | 3149 Food Corp. |
| Motts Applesauce 25 oz. | Teitler, Food Pageant, 170 Lenox Corp. |
| Motts Apple Juice 46 oz. | Food Pageant, |
| Bumble Bee Cohoe Salmon 3.75 oz. | Teitler |
| Bumble Bee Red Salmon 16 oz. | Food Pageant |
| Bumble Bee Pink Salmon 16 oz. | Food Pageant, Sureway |
| Bumble Bee Blueback Salmon 7 oz. | Teitler, Food Pageant, 3149 Food Corp. |
| Bumble Bee Red Alaska Salmon | Food Pageant |
| Icy Point Salmon 16 oz. | Food Pageant, 3149 Food Corp., 170 Lenox Corp. |
| Tuxedo Salmon 16 oz. | Food Pageant, 170 Lenox Corp |
| White Rose Blueback Salmon 3.75 oz. | Teitler |
| Libby Potted Meat lg. | Food Pageant, Sureway |
| Libby Potted Meat small | Sureway |
| Libby Vienna Sausage 9 oz. | Sureway |

B.-1 Comparison of Scratches and Deliveries of Carolina Rice.

1. Plaintiff received one case of each of the 1, 3 and 10 pound sizes. It was scratched in the 1 lb. (1 case), 2 lb. (3 cases), 3 lb. (2 cases), 5 lb. (2 cases) and 10 lb. (1 case) sizes.

2. Teitler received one case of each of the 1, 3 and 10 pound sizes, just as plaintiff. It was scratched on the 10 lb. (19 cases), 5 lb. (5 cases), 3 lb. (4 cases), 2 lb. (3 cases) and 1 lb. (1 case) sizes.

3. Food Pageant received one case of each of the 10 pound sizes. It was scratched in the 10 lb. (14 cases) and 1 lb. (2 cases) sizes.

4. 170 Lenox Corp. received one case each of the 1, 3 and 10 pound sizes, just as plaintiff did. It was scratched on the 10, 5 (2 cases) 3, 2 (2 cases) and 1 pound sizes.

Simply stated, an analysis of the two weeks covered by this Appendix demonstrates equality of treatment, not discrimination. As can be seen from the main brief, which discusses the comparisons made by Mr. Ricci on cross-examination with respect to two weeks in September and the analysis set forth in Appendices II and III, there is absolutely no factual support for plaintiff's claim of discriminatory scratches.

## Appendix II

| Scratched to Plaintiff on October 16 As Reflected In the Schedule to the Glenn Affidavit | Scratched to Other Stores By Met During Week of October 15, 1973.* |
|---|---|
| 1. Libby Meats | |
| (a) Potted Meat 3-14 oz. | Sureway, Food Pageant, Cherrie, Teitler** |
| (b) " " 5-1/2 oz. | Sureway, Food Pageant, Cherrie, Teitler |
| (c) Tamales | Sureway, Food Pageant, Food City, Cherrie |
| (d) Sloppy Joe | Sureway, Food Pageant, Cherrie |
| (e) Beef Stew, 15 oz. | |
| (f) Beans & Vienna Sausage, 15 oz. | Cherrie |
| (g) J.O. Roach Paste, 5 oz. | Sureway, Food Pageant |
| (h) Comet Cleanser, 17 oz. | Food Pageant |

*The scratches are set forth in the following documents marked for identification: Sureway Ex. 80F, dated Oct. 17, 1973; Food Pageant, Ex. 77, dated October 16, 1973; Food City, Ex. 78H, dated October 15, 1973; Cherrie, October 19, 1973, Teitler Benjal, Ex. 83N, dated October 17, 1973. (All of which were introduced into evidence as Local 338's Ex. QQ).

**The other stores also had a number of other Libby meat products listed as being scratched, to wit:

| | |
|---|---|
| (1) Sureway -- | Chilli with Beans; Corned Beef Hash Hm. Style; Vienna Sausage, 9 oz.; |
| (2) Food Pageant | Vienna Sausage 9 oz.; |
| (3) Food City -- | Corned Beef Hash, large and small cans; |
| (4) Cherrie Retail -- | Corned Beef Hash; Corned Beef 7 oz.; Vienna Sausage 9 oz. |
| (4) Teitler -- | Corned Beef Hash; Corned Beef 7 oz.; Corned Beef Hash, Hm Style; Vienna Sausage, 9 oz.; Meatball Stew. |

All of the Libby meat products which were scratched to plaintiff and/or its competitors were listed as being "not available" in Met's Cost-Plus Book for the week of October 12-19, 1973.

| | | |
|---|---|---|
| (i) | Pillsbury Hungry Jack Potatoes | Food Pageant |
| (j) | Gold Medal Flour, 2 lb. size | Sureway, Food Pageant, Food City, Teitler |
| (k) | Jack Rabbit Cow Peas | Food Pageant |
| (l) | Red Pack Puree, 28 oz. | Food City |
| (m) | Wisk 16 oz. | Cherrie |
| (n) | Del Monte Grapefruit Sections, 16 oz. | Food City |

In light of plaintiff's insistent concern with respect to Carolina Rice, the delivery and/or scratches of that product to other stores in the alleged target area serviced by Met is set forth below:

As was shown in the accompanying memorandum (p. 15) and that week's delivery invoice (Local 338 Ex. L at pp. 5-6), plaintiff, in fact, received one case of each of the 1, 2, 3, 5 and 10 pound sizes of Carolina Rice on October 16th. Carolina Rice was on a one case ration according to the Met Cost-Plus Book for that week.

The Food Pageant delivery (Ex. 77 M-1 id.) of October 16th shows that no Carolina Rice of any size was delivered. The Food City delivery of October 15th, (Ex. 78H id.) lists Carolina Rice as rationed; that competitor received one case of the 1, 2, 3 and 10 pound sizes. The 3149 Food Corp. delivery (Ex. 75F id.) of October 16th lists Carolina Rice as rationed; that competitor received one case of the 1, 2, 3, 5 and 10 pound sizes, just as plaintiff did.

The Sureway delivery of October 17th (Ex. 80F id.) reveals that 5 cases of the one pound size were scratched; in addition, there is a red ink line through the 2, 3 and 10 pound sizes thereby indicating that the one case quantity set forth on the delivery invoice were scratched in the warehouse.

The Cherrie delivery of October 19th, reveals that no Carolina Rice was scratched and that the 1, 2, 3 and 10 pound sizes were delivered in 2-3 case quantities.

This analysis thus presents the following composite picture. On the first two days of the week, i.e. October 15 and 16th, Met only had enough rice to deliver one case of the four requisite sizes to plaintiff and its competitors, Food City and 3149 Food Corp. By the third day of the week, i.e., October 17th, Met had run out of the 1, 2, 3 and 10 pound sizes of Carolina Rice as can be seen by the Sureway delivery. Apparently, sometime between the morning of October 17th and October 19th when the delivery to Cherrie was processed, a new shipment of Carolina Rice was received. Indeed, on plaintiff's next delivery on October 24th, it too received three cases of the two pound size, two cases of the one pound size and two cases of the ten pound size. See Ex. 85B at p.7. Absolutely no discrimination against plaintiff can be shown in that series of transactions.

## Appendix III

Comparison Between the Critical Items on Plaintiff's Scratch According to Mr. Blythe and the Met Cost Plus Books for the Corresponding Weeks.

A. August 28, 1973 Delivery
(Ex. 62C)

| Critical Items Scratched (Blythe Tr. 721-3): | | References, if any, in Met Cost-Plus Book |
|---|---|---|
| (a) | Del Monte Peaches, 5 varieties | Nine varieties listed as not available. |
| (b) | Del Monte Tomato Sauce | Not available. |
| (c) | Carolina Rice | Not mentioned; see Appendix I, A-1. |
| (d) | Icy Point Salmon | Not available.(5 sizes). |
| (e) | Rubenstein Salmon | Not available.(2 sizes). |
| (f) | Chicken of the Sea Tuna | Not mentioned. |
| (g) | Libby Corned Beef 7 oz. | Not available. |
| (h) | Libby Corned Beef Hash | Not available. |
| (i) | Gold Medal Flour | One case limit which plaintiff received. See Local 338 Ex. G at p. 5. |

As can be seen from Appendix IA and A-1, the other stores served by Met in the alleged target area were scratched in these same products that week.

Appendix III.

B. September 6, 1973 Delivery
(Ex. 63C)

| Critical Items Scratched (Blythe Tr. 723-6) | Reference, if any, in Met Cost-Plus Book [8/31 - 9/6, 1973] |
|---|---|
| (a) Icy Point Salmon | Not available in six varieties. |
| (b) Bumble Bee Salmon | Not available in eight varieties. |
| (c) Carolina Rice | Not mentioned; see Appendix B-1. |
| (d) Del Monte Peaches | Not available in five varieties; three varieties* on limit. |
| (e) White Rose Peaches | Not mentioned. |
| (f) Libby Peaches | Not mentioned. |
| (g) S&W Peaches | Not available in three varieties. |
| (h) Red Breast Salmon | Not available in two varieties. |
| (i) White Rose Salmon | Not available in three varieties. |
| (j) Libby Corned Beef 7 oz. | Not available. |

*The three varieties of Del Monte Peaches listed as on limit, were, 16 oz. Y.C. Hvs., 16 oz. Y.C. Sliced and 29 oz. Y.C. Sliced (10 case limit); plaintiff ordered one case of each and received the quantity ordered.

Appendix III.

B. September 6, 1973 Delivery
(Ex. 63C)

| Critical Items Scratched (Blythe Tr. 723-6) | Reference, if any, in Met Cost-Plus Book [8/31 - 9/6, 1973] |
|---|---|
| (a) Icy Point Salmon | Not available in six varieties. |
| (b) Bumble Bee Salmon | Not available in eight varieties. |
| (c) Carolina Rice | Not mentioned; see Appendix B-1. |
| (d) Del Monte Peaches | Not available in five varieties; three varieties* on limit. |
| (e) White Rose Peaches | Not mentioned. |
| (f) Libby Peaches | Not mentioned. |
| (g) S&W Peaches | Not available in three varieties. |
| (h) Red Breast Salmon | Not available in two varieties. |
| (i) White Rose Salmon | Not available in three varieties. |
| (j) Libby Corned Beef 7 oz. | Not available. |

*The three varieties of Del Monte Peaches listed as on limit, were, 16 oz. Y.C. Hvs., 16 oz. Y.C. Sliced and 29 oz. Y.C. Sliced (10 case limit); plaintiff ordered one case of each and received the quantity ordered.

C. September 17, 1973 Delivery
(Ex. 64C)

| Critical Items Scratched (Blythe Tr. 729-30) | Reference, if any, in Met Cost-Plus Book Sept. 14-21, 1973 |
|---|---|
| (a) W.R. Elberta Peach Hvs. | |
| (b) Motts Apple Sauce | P. 2 contains a Notice that six varieties, including the 25 and 48 oz. sizes were withdrawn from sale by the manufacturer. |
| (c) Del Monte Peaches | Some "on limit", others* not available. |
| (d) Libby Peaches (2 varieties) | Not available. |
| (e) S&W salmon | Not available in two varieties |
| (f) Bumble Bee Salmon | Not available in eight varieties. |
| (g) Red Breast Salmon | Not available in two varieties |
| (h) Icy Point Salmon | Not available in six varieties |
| (i) Bumble Bee Tuna Fish | Not mentioned. |
| (j) Chicken-of-the Sea Tuna Fish | Temporarily out of stock in one variety. |
| (k) Starkist Tuna Fish | Not mentioned. |
| (l) Libby Corned Beef 7 oz. | Not available** |
| (m) Kraft Mayonnaise | Not mentioned. |

---

* Plaintiff received one case of four different varieties of Del Monte peaches. See Local 338 Ex. I at p. 3. Plaintiff was scratched in two varieties of peaches, both of which were listed under the not available column.

** The 12 ounce size of Libby Corned Beef was on a one case limit. Plaintiff received a case. See Local 338 Ex. I at p. 16.

D. September 24, 1973 Delivery
(Ex. 65C)

| Critical Items Scratched (Blythe Tr. 730) | | References, if any, in Met Cost-Plus Book Sept. 21-28, 1973 |
|---|---|---|
| (a) | Motts Applesauce | Notice on p.4 states that six varieties have been withdrawn by the manufacturer. |
| (b) | Red Pack Tomato Paste | Not available. |
| (c) | Progresso Tomato Paste | Not available. |
| (d) | Red Pack Tomatoes | Temporarily out of stock in two sizes. |
| (e) | S&W Peaches | Not available. |
| (f) | White Rose Peaches | On one case limit. |
| (g) | Del Monte Peaches | The scratched peach item is listed as temporarily out of stock.* |
| (h) | Libby Peaches | Not mentioned. |
| (i) | S&W Blueback Salmon 3.75 oz. | Not available. |
| (j) | Bumble Bee Salmon | Not available in eight varieties. |
| (k) | Icy Point Salmon | Not available in that and five other varieties. |
| (l) | Bumble Bee Light Chunk Tuna | Not mentioned. ** |
| (m) | White Rose Chunk Tuna | Not mentioned. |
| (n) | Chicken-of-the-Sea Tuna | Not mentioned. |
| (o) | Libby Corned Beef Hash 2 sizes | Not available in both sizes. |

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*Plaintiff did receive five other varieties and sizes of Del Monte peaches, 65B at p.3.

**As can be seen from the delivery invoice (Ex 65B at pp 17-18), plaintiff did receive five varieties and sizes of Bumble Bee tuna and other varieties and sizes of Starkist and Chicken-of-the Sea tuna that week.

Appendix III.

E. October 1, 1973 Delivery
(Ex. 67C)

| Critical Items Scratched (Blythe Tr. 733) | | Reference, if any, in Met Cost-Plus Book Sept. 28 - Oct. 5, 1973 |
|---|---|---|
| (a) | Carolina Rice (4 sizes)* | Not mentioned |
| (b) | Libby Corned Beef 7 oz. and 12 oz. | The 7 oz. not available; 12 oz. on limit, one case** |
| (c) | Libby Corned Beef Hash | Not available. |
| (d) | Bumble Bee Salmon | Eight varieties of Bumble Bee Salmon, including these two, are listed as not available. |
| (e) | Bumble Bee Pink Salmon | Eight varieties of Bumble Bee Salmon, including these two, are listed as not available. |
| (f) | Eighteen other varieties of salmon | Six varieties of Icy Point Salmon, three of White Rose Salmon, two of Red Breast, two of Gil Netter, Papco, Tuxedo, S. & W. and Del Monte Salmon were all listed as not available. |
| (g) | Del Monte Stewed Tomatoes | Temporarily out of stock |
| (h) | Motts Apple Sauce | Not available in the two varieties scratched. |
| (i) | S. & W. Peaches (2 sizes) | Not available in both sizes and others not mentioned. |
| (j) | Maxwell House Coffee | Not mentioned. |
| (k) | Pride of Farm Tomatoes | Not mentioned |
| (l) | Bumble Bee Tuna | Not mentioned. |

*Plaintiff did receive one case of the two pound size and two cases of the five pound size of Carolina Rice. See Local 338 Ex. K at pp.56,2

**Plaintiff received its one case ration. See Local 338, Ex. K at p.1 The case ordered in excess of the rationed quantity was scratched.

Appendix III.

F. October 16, 1973 Delivery
(Ex. 68C)

| Critical Items Scratched (Blythe Tr. 733-4) | Reference, if any, in the Met Cost-Plus Book October 12-19, 1973 |
|---|---|
| (a) Carolina Rice (5 sizes) | On limit, one case, on each size* |
| (b) Libby Corned Beef | The 7 oz.size is listed as not available; the 12 oz.siz is on a 1 case limit.** |
| (c) White Rose Salmon | Not available in three sizes |
| (d) Red Breast Salmon | Not available in two sizes |
| (e) Rubenstein Salmon | Not mentioned |
| (f) Gil Netter Salmon | Not available in two sizes |
| (g) S. & W. Salmon | Not available *** |
| (h) Red Pack Tomatoes | Not mentioned |
| (i) Red Pack Puree (2 sizes) | Not mentioned |
| (j) Motts Apple Sauce (2 varities) | Not available in the two types scratched. |
| (k) Bumble Bee Tuna | Not mentioned |

*Plaintiff received one case of each size of Carolina Rice. See Local 338, Ex. L; see also Appendix II.

**Plaintiff received one case of the 12 oz. size of Libby Corned Beed, See Local 338, Ex. L. The second case ordered was scratched because it exceeded the rationed limit. Although Mr. Blythe did not consider Libby Potted Meat, Tamales, Sloppy Joe, Beans & Sausage, of Vienna Sausage, 9 oz. as being critical items,each of these items are listed as "not available". As can be seen from Appendix II, these non critical items, which appear on Mrs. Glenn's schedule, were scratched to plaintiff and its competitors that week.

***Also listed as not available in that week's Cost-Plus Book were eight varieties of Bumble Bee Salmon, six varieties of Icy Point Salmon, Papco Salmon, Red Rambler Salmon, Tuxedo Salmon, Del Monte Red Salmon, etc.

## APPENDIX IV

### Items Claimed To Have Been Consistently Scratched Which Were In Fact Consistently Delivered

Mrs. Glenn testified on her direct examination that each of the items of food and household merchandise set forth in the schedule to her affidavit were consistently scratched. Set forth below are the true facts with respect to certain of those items, selected at random for purposes of illustration.

Motts apple juice in the 32 oz. and 40 oz. sizes were delivered in the quantities ordered every week. See e.g., Local 338 Ex G p.1 (August 28th), Local 338 Ex H p.3 (September 6), Ex I p.3 (September 17), Ex 65B p.4 (September 24), Ex K p.3 (October 1), Ex 69B p.1 (October 11), Ex L p.3 (October 16). Those sizes of Motts apple juice do not appear on any of plaintiff's scratch lists.

Libby Vienna Sausage in the 5 ounce size was delivered to plaintiff in the quantity ordered every week. See Local 338 Ex H p.4, Ex I p.5, Ex 65B p.5, Ex K p.4, Ex L p.4. That size of Libby Vienna Sausage apparantly was not ordered by plaintiff in at least two of the weeks during the period since there is no reference to it on either the delivery invoice or the scratch lists for the August 28th and October 10th deliveries.

compare Local 338 Ex G with Ex 62C; compare Ex 69B with 69C.

Similarly, plaintiff received deliveries every week in the 16 oz. Hellmann's Sandwich Spread; with the sole exception of October 16th, plaintiff received the 8 oz. size every week. See e.g.; Ex G p.17, Ex H p.14, Ex J p.15, Ex I p.18, Ex 65 p.21, Ex K p.15, Ex L p.13, Ex 85B p.14.

Defendants do not suggest that every product which plaintiff ordered was delivered by Met every week. There were certain products, such as, for example, various of the Libby Meats (e.g., Vienna Sausage 9 oz., Corned Beef 7 oz., Corned Beef Hash, Potted Meat, Tamales) or the Motts Apple Juice 46 oz. which were scratched whenever they were ordered during this period. However, as can be seen from the weekly Met Cost Plus Books (Shopwell Ex A) these products were listed every week as being unavailable. See e.g., Met Cost-Plus Books for August 28-31 (at p.8); August 31 - September 7 (at pp 6-7); September 14-21 (at p.10); September 21-28 (at p.10); September 28 - October 5 (at pp 12-3); October 5-12 (at pp 9-10); October 12-19 (at pp 8-9); October 19-26 (at p.8). As can be seen from Appendices I and II hereto, plaintiff's competitors were also being consistently scratched in those products.

## Appendix V

Analysis of Scratches on the October 16, 1973 Delivery to Sure Save Food Market, Inc. Located at 13 West 100th Street, New York, N.Y.

1. Items Scratched to that Store:

The October 16th scratch list to the Sure Save Food Store lists 92 different items, totalling 180 cases which were not delivered by Met.* The 92 items scratched include:

(a) Comet Cleanser 17 oz.

(b) Libby Potted Meat 3.25 oz.

(c) Libby Potted Meat 5.5 oz.

(d) Libby Tamales

(e) Libby Sloppy Joe

(f) Libby Corned Beef 7 oz.

(g) Libby Vienna Sausage 9 oz.

(h) Libby Corned Beef Hash Hm. Style 15.5 oz.

(i) Bumble Bee Red Salmon 16 oz.

(j) Del Monte Red Salmon 16 oz.

(k) Icy Point Red Salmon 16 oz.

(l) Gold Medal Flour 2 lb.

*The delivery invoice of October 16th indicates that Met delivered 527 different items totaling 879 cases to the Sure Save Store. Mathametically, approximately 17 per cent of Sure Save's total order was scratched on October 16. The percentage of total cases scratched vis-a-vis total cases delivered is 21 per cent.

Appendix V (cont'd)

(m) Paper Bags #10

(n) Paper Bags # 14

(o) Paper Bags #16

(p) Ice Cream Bags

(q) 1/6 Double Bags

(r) Motts Golden Delicious Applesauce 20 oz.

(s) Del Monte Elberta Peach Hvs. 29 oz.

(t) Bumble Bee Pink Salmon 7.75 oz.

(u) Icy Point Pink Salmon 7.75 oz.

(v) Icy Point Alaska Salmon 16 oz.

(w) Bumble Bee Pink Salmon 16 oz.*

(x) J. O. Roach Paste 5 oz.

2. Of the items which Mrs. Glenn allegedly purchased at the Sure-Save Store on October 20th, the majority were not delivered by Met to that Store that week. Thus, Ex. PP. reflects that Met did not deliver any Alka Seltzer, White Rose Potatoes, Welch's grape juice, 24 oz., Del Monte Grapefruit Sections, Libby Tamales, Kellog's Stuff, Comet 17 oz., S.&W. Nuts, Jack Rabbit Cow Peas or two of the sizes of Baggies, which Mrs. Glenn purchased at that store on October 20th. With respect to those items, the record does not indicate whether they had been delivered by Met at some prior time when they were available to everyone, whether they had been purchased at a cash and carry warehouse or some other wholesale or whether they had been stored in the basement or back-room of Sure-Save

for months.

Of the few remaining items which Mrs. Glenn purchased and which had been delivered to Sure-Save by Met that week, Mrs. Glenn admitted on cross-examination that some of these had also been delivered to plaintiff that week (e.g., Comet 4 pack, S.&W. Nuts) and others had not even been ordered by plaintiff (e.g., Baggies, 75 to the box).

3. Local 338's Ex. pp also reflect that the Sure-Save store only received two cases of Carolina Rice. As shown by Local 338's Ex. L and, as Mrs. Glenn admitted, plaintiff that week received one case of the 1, 2, 3, 4 and 10 pound sizes of Carilina Rice. Plaintiff thus received far more Carolina Rice then the Sure-Save store.

4. As can be seen from Appendix II supra, many of the items which were scratched to the Sure-Save Store on October 16th had also been scratched that week to plaintiff and the other Met customers in the alleged target area. As can be seen from Appendix III, (at p.6 and footnotes thereto), the vast majority of the items scratched to Sure-Save were listed under the "not available" heading on the weekly Met Cost-Plus Book for the week of October 12 - 19, 1973.

I, Howard B Wemmel
an attorney at law,
hereby certify that I
served 2 copies of
this brief upon Lou
T. Walker, attorney for
appellant, by delivering
same to her office on
April 3, 1974, 1:45 P.M.

Howard B Wemmel